Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MILLER, et al.,
Appellants,

vs.

CALIFORNIA COMMISSION ON THE STATUS OF WOMEN,
Appellees.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is a California statute construed as authorizing a state agency to use public funds for legislative political lobbying repugnant to the First Amendment of the United States Constitution?

2. Even if a statute authorizing legislative lobbying by a state agency is not per se violative of the First Amendment, does it become so if the government's ideological and political lobbying was, as in this case, inaccurate, misleading and unfair as well as partisan?

3. Are California statutes establishing a state agency for women and expressly authorizing its unbounded political action used to promote feminist ideology, repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
A. California Government Code § 8246 and the First Amendment	1
B. California Government Code §§ 8240 and 8246 and the Fourteenth Amendment	2
Constitutional and statutory provisions	4
Statement of the case	5
The federal questions are substantial	10
A. First Amendment right to know and to be free of compelled associations	10
B. The Fourteenth Amendment right to equal protection of the laws	16
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

Page

Abood v. Detroit Board of Education 430 U.S. 705 (1977) 13, 14, 22

Bolger v. Youngs Drug Products Corp. ..... U.S. ..... 77 L.Ed. 2d 469, 103 S.Ct. (1983) 10

Buckley v. Valeo 424 U.S. 1 (1976) 3, 13

Califano v. Webster 430 U.S. 313 (1977) 18

City of Boston v. Anderson 439 U.S. 1060 (1979) 2

Craig v. Boren 429 U.S. 190 (1976) 18

C.S.C. v. National Association of Letter Carriers 413 U.S. 548 (1973) 19

Elrod v. Burns 427 U.S. 705 (1977) 13

Frontier v. Richardson 411 677 (1973) 18

Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974) 12, 13

Globe Newspaper Co. v. Superior Court 457 U.S. 596 (1982) 13

Konigsberg v. State Bar 366 U.S. 36 (1961) 12, 13

Linmark Associates Inc. v. Wilingboro 431 U.S. 85 (1977) 10

Miller v. California Comm. on Status of Women 151 Cal. App. 3d 693, ... Cal. Rptr. ..... (1984) ..... 1, 2, 3, 5, 9 ..... 10, 14, 16, 21

Miller v. Miller 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978) 1, 2, 3, 5, 13

Mississippi University for Women v. Hogan 458 U.S. 718 (1982) 17, 18

Mountain States Legal Foundation v. Denver School Dist. 459 F.Supp. 357 (D. Colo. 1978) 15

Table of Authorities Cited

Cases

Page

Police Department of Chicago v. Mosley 408 U.S. 92 (1972) 13

Reed v. Reed 404 U.S. 71 (1971) 18

Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980) 13

Schlesinger v. Ballard 419 U.S. 498 (1975) 18

Stanson v. Mott (1976) 17 Cal. 3d 306 .....3, 8. 13, 15

Unger v. Superior Court 1st DCA 7/19/83 19

Unger Superior Court 102 CA 2d 681 (1980) 19

United States v. Harris 347 U.S. 612 (1953) 20

Va Pharmacy Bd. v. Va Consumer Council 425 U.S. 748 (1976) 10, 12

Weinberger v. Wiesenfeld 420 U.S. 636 (1975) 16, 18

West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943) 13

Wooley v. Maynard 430 U.S. 705 (1977) 15

Constitution

United States Constitution:

Article II, Section 6 19

First Amendment .....i, 1, 4, 10, 13

Fourteenth Amendment .....i, 2, 4, 16

Table of Authorities Cited

Statutes

Page

California Election Code:
§§ 3525-3567, 3570, 3578, 3714, 4015, 4015.5, 4018, 5012-5016, 5151, 5157.5 19

California Government Code:
§ 8240 ..... 2, 4, 17
§§ 8240 et seq. 9
§ 8246 ..... 1, 2, 3, 4, 9, 10, 20
§ 8246(c) 9
§ 50023 20
§ 53060.5 21
§ 54950 21

California Political Reform Act of 1974, Government Code §§ 81000-91014 19

Internal Revenue Code § 501(c)(3) 19

Miss. Code Ann. § 37-117-3 (1972) 17

The Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-454; 5 U.S.C. § 4107(b)(i) 19

18 U.S.C. § 1913 20

22 U.S.C. § 614(b) 19

Other Authorities

Governments Speak: Toward a Theory of Government Expression and the First Amendment. 57 TexL.Rev. 863 (1979) 6

"Right to Know Why" 17 Harv. Civil Rights Civil Liberties L.Rev. 297 (1982) 13

U.S. News & World Report, October 31, 1983, p. 66-67.. 19

11 Pepperdine L.Rev. 421, 438 (1984) 17

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the California Supreme Court denying appellants' motion to transfer the cause to itself and in the alternative to stay the remittitur entered April 26, 1984 and the order of the California Court of Appeal denying appellants' petition for rehearing entered February 28, 1984 are set out in the appendix. The opinion of the California Court of Appeal upholding the statutory authorization for the Commission to lobby the legislature is reported as *Miller v. California Comm. on Status of Women* 151 Cal. App. 3d 693 ..... Cal. Rptr. ..... (1984) (*Miller II*). The predecessor opinion of the California Court of Appeal prohibiting the Commission from lobbying the public at large on behalf of the Equal Rights Amendment is reported as *Miller v. Miller* 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978) (*Miller I*). These opinions are also included in the appendix.

JURISDICTION

A. California Government Code § 8246 and the First Amendment

This taxpayer action to enjoin the California Commission on the Status of Women from legislative lobbying draws in question the validity of California Government Code § 8246 which is construed expressly to allow partisan legislative lobbying by the Commission. The statute authorizing partisan advocacy of the Commission, a state agency, is repugnant to the First Amendment to the Constitution of the United States because under the Amendment all California taxpayers and legislators are entitled first, to know the truth unsullied by government propaganda and second, to be free from being forced to join or support positions or views which they find objectionable on moral, ideological or personal grounds. The California statute, as construed by the California Court of Appeal, is a legislative warrant to advocate and promote the

Commission's partisan position on moral and ideological issues. 151 Cal. App. 3d at p. 698. As the Commission admitted and the court noted in *Miller v. Miller* 87 Cal. App. 3d at pp. 764 through 766 inclusive and as the trial court found in *Miller v. Commission* below, the Commission's position is and has been aggressively partisan at public expense.

B. California Government Code §§ 8240 and 8246 and the Fourteenth Amendment

The taxpayer action to abolish the California Commission on the Status of Women draws in question the validity of California Government Code §§ 8240 and 8246 creating an actively partisan state commission on the status of women. The California statutes creating a state political agency for feminists is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because under the Amendment, the state must carry its burden of showing an exceedingly persuasive justification for the gender preference as substantially related to the achievement of important governmental objectives. Other than the statute's obsolete recitation of a benign compensatory purpose, the state in this case showed neither at trial nor on appeal, any justification at all for the gender preference of the challenged statutes.

The federal constitutional questions were timely raised by appellants in their complaint and were decided adversely to appellants by both the trial court and the Court of Appeal. 151 Cal. App. 3d at pp. 699-702. Section 8246, in effect, created a new government first amendment right of free speech; a right implicitly denied by this court in dismissing the City of Boston's appeal in *City of Boston v. Anderson* 439 U.S. 1060 (1979). The Court of Appeal claimed that the government was only adding its voice to others it must tolerate and that it had a legitimate

interest in informing, in educating and in persuading the public. 151 Cal. App. 3d at pp. 700, 701. Since, however, the trial court's injunction was in part based upon government speech found to be partisan, unfair and inaccurate, the Court of Appeal's reversal using § 8246 vindicates at the expense of appellants' First Amendment rights, government speech which was shown to be misleading and false. Such speech is the essence of government propaganda. The Court of Appeal also held that since the Commission was not a public forum, was not influencing an election and had not drowned out appellants' voice, their First Amendment claims must fail. 151 Cal. App. 3d at p. 702. Prior California decisions have dismissed the validity of the court's public forum and elections reasonings *Stanson v. Mott supra at* pp. 210-211, 219, *Miller I* at pp. 764-766, 768-769 and this court in *Buckley v. Valeo* 424 U.S. 1 (1976) precluded the government from weighting the relative voices of competing interests, even though their voices were not entirely drowned out.

With respect to the equal protection issue, the Court of Appeal, without any showing by the state, merely held that public resources may be used to remedy gender bias in fulfillment of the constitutional principle of equality and that appellants' problem was that they objected to equality for women. 151 Cal. App. 3d pp. 699, 702. Appellants repeatedly proclaimed themselves strongly in favor of gender equality of opportunity but vehemently opposed being compelled to support the agency's feminist protocol as the orthodox faith of the realm.

Appellants filed a timely motion for rehearing before the Court of Appeal, which was denied on February 28, 1984 and appellants' timely motion to the California Supreme Court to transfer the cause to itself and alternatively to stay the remittitur was denied on April 26, 1984, with Justice Reynoso, author of the concurring opinion in *Miller I*, not participating.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Government Code § 8240 states:

> The Legislature finds and declares that despite the fact that women have greater equality in California than in many states, they still are not able to contribute to society according to their full potential. With a view to developing recommendations which will enable women to make the maximum contribution to society, the Legislature has created the Commission on the Status of Women.

California Government Code § 8246 states:

> (a) The commission is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals.
>
> (b) The commission is expressly authorized to state its position and viewpoint on issues developed in the performance of its duties and responsibilities as specified in this chapter.
>
> (c) This section is declaratory of existing law.

STATEMENT OF THE CASE

Individual appellants and a coalition of women's groups brought a taxpayers suit in November 1976 to dissolve the California Commission on the Status of Women or else to confine it to an objective informational role. They claimed that the Commission had engaged in ultra vires political advocacy at public expense. Notwithstanding persistent comment in the opinions below that appellants are against equality for women, *Miller v. Miller* 87 Cal. App. 3d at pp. 773-774 (Miller I); *Miller v. California Commission on the Status of Women* 151 Cal. App. 3d at pp. 679, 702 (Miller II), appellants have just as persistently asserted that the overriding issue is not equal rights for women, which they support, but feminist government propaganda, which they oppose. In *Miller I,* after reciting at length the Commission's admitted advocacy of the Equal Rights Amendment, the court held:

> It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view. The latter "undermines or distorts the legislative process" just as clearly as "the use of the public treasury to mount an election campaign . . . [distorts] the integrity of the electoral process." (*Miller I, supra* at pp. 768-769.)

Miller I assumed, without deciding, the propriety of legislative lobbying by the Commission 87 Cal. App. 3d at p. 767 n. 2. Based upon the perceptive comment of Professor Mark G. Yudof, appellants challenged in *Miller II* the Commission's extensive legislative lobbying as both unauthorized and unconstitutional:

> Why is lobbying different in kind from an attempt to influence public opinion, which in turn will influence legislators? Is the bond election in *Stanson* much different from the campaign to influence the state legis-

lature in *Bonner-Lyons* in terms of the dangers of government speech? Certainly, one would be hard pressed to say that one issue was more or less partisan or controversial than the other, and the possibility of distortion of the democratic process is apparent in both cases.

When Governments Speak: Toward a Theory of Government Expression and the First Amendment. 57 TexL.Rev. 863 (1979)

On July 7, 1982 after a trial on the merits going to the Commission's political activity, the court declared that the Commission's speech must be informational and enjoined the Commission as follows:

The Court finds that such activities have involved the expenditure of public funds, and to the extent that such activities have not presented an impartial viewpoint, they are not activities within the authority and purposes of the Commission. However, the Court finds that evidence as to the extent of the expenditure of public funds is insufficient upon which to base a judgment, and, accordingly, the Court makes no finding thereon. Such activities do not comply with the mandate of Chapter 3.1 and violate the duty of the Commission to undertake its functions impartially, and to present neutrally, differing viewpoints of various individuals and groups within the population the Commission is designed to serve.

The Court declares that the activities of the Commission must be carried out within the authority and purposes set forth in the provisions of Chapter 3.1. Specifically, the Court declares that the Commission **shall**:

a. When conducting studies pursuant to subdivision (a) of Section 8245 of the Government Code, study

all sides of each subject and consider, where they exist, opposing viewpoints with respect to such issues, and shall not expend public funds for the purpose of studying such subjects without giving equal consideration to all sides of the issue in question.

b. When acting as an information center pursuant to subdivision (b) of Section 8245, act impartially in gathering and disseminating information, refrain from presenting any particular viewpoint with respect to the information gathered or disseminated, and assure the availability of fair and impartial factual information regarding the issue in question.

c. When acting pursuant to subdivision (c) of Section 8245, assure that such materials, projects or other activities, and that such technical and consultative advice, is free from the assertion of any particular point of view or political or partisan position with respect to any issue involved, and take such steps as may be necessary to assure that such materials, projects and activities are fairly and impartially constructed such that no particular position with respect to any issue is expressed or implied by the Commission.

d. When carrying out the functions described in subdivision (d) of Section 8245, set forth in neutral terms such self-help activities which have been or may be undertaken by organizations or groups with differing objectives and values concerning the particular issues or concerns being addressed by such groups.

e. In reporting its activities, findings and recommendations to the Legislature, include all the various viewpoints, approaches and objectives of the population being served by the Commission, and to do so in a fair and impartial factual manner so as to present an unbiased report on the issues addressed.

4. The Court finds that the Commission is not the kind of agency designed to "devise legislative proposals to attempt to implement the current administration's policies."

> "[W]hile public agency 'lobbying' efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies. Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave[s] to the 'free election' of the people (see Cal.Const., art. II, § 2), does present a serious threat to the integrity of the electoral process." *Stanson v. Mott* (1976) 17 Cal. 3d [3] 18.

Unlike the agency involved in *Stanson, supra,* it is the opinion of this Court that the Commission's functions are more limited; and it is intended to be only an advisory and informational body. Thus, it has no power to "lobby" to promote causes or even to engage in public agency lobbying, in the sense that it may propose specific legislation or recommend the passage or defeat of measures pending before the California Legislature or other legislative, quasi-legislative or regulatory agencies.

Because it is an informational, advisory body, the Commission may do no more than express the views on

> all sides of any particular issue and discuss the potential benefits or detriments of each respective viewpoint. Its function in making recommendations to public and private bodies is to point out those areas which in the view of the Commission merit the attention of legislative, quasi-legislative or regulatory agencies or which call for individual programs or projects by local or statewide public and private agencies.

In a move which the concurring justice in *Miller II* at p. 703 saw as a clear response to the trial court's judgment, the legislature soon enacted a new section of the government code, § 8246:

> (a) The commission is expressly authorized to inform the Legislature of its position on any legislative proposals.
>
> (b) The commission is expressly authorized to state its position and viewpoint on issues developed in the performance of its duties and responsibilities as specified in this chapter.
>
> (c) This section is declaratory of existing law.

The Court of Appeal in February 1984 reversed the injunction on the basis of the statute which, the court said, was a warrant for the Commission to "advocate and promote" its positions on any subject within its broad mandate. *Miller II* at p. 698. This warrant, the court said, not only destroyed the trial court's injunction, but cut the ground from beneath *Miller I* as well. *Miller II* at p. 697.

Inasmuch as § 8246(c) states that the statute is declaratory of existing law, the legislative authorization for the Commission to state its position and to inform the legislature of its position under subsections a and b would appear to give the Commission authority only to make recommendations to the legislature which are impartial, fair and accurate pursuant to *Miller I* at pp. 769-771 and §§ 8240

et seq. The Court of Appeal, however, interpreted § 8246 to be (contrary to its plain wording) not declaratory of existing law, but instead the establishment of a new government right of free speech; the right of a government agency to advocate and promote at public expense its partisan position on political or moral issues.

The trial court in *Miller II* required, pursuant to *Miller I* the Commission to be impartial, fair and accurate in its speech. The Court of Appeal in *Miller II* did not require either the Commission's position or its advocacy of that position to be impartial, fair or accurate. The basis for the appellate court's reasoning is that government has a legitimate interest in informing, in educating and in persuading. *Miller II* at p. 701. The court's statement begs the very question at issue. An examination of the record reveals that the Commission has always perpetrated its partisan position as informational and educational. Obviously, its purpose has been to persuade. Inasmuch as the Court of Appeals has inflated § 8246 to unconstitutional proportions so as expressly to overrule the trial court's injunction, the California statute must be regarded as unconstitutionally authorizing government partisan advocacy at public expense.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. First Amendment Right to Know and to Be Free of Compelled Associations

There is a First Amendment right to receive accurate and truthful information which the state may not impair, even in a commercial context. *Bolger v. Youngs Drug Products Corp.* U.S. 77 L.Ed. 2d 469, 103 S.Ct. (1983); *Linmark Associates Inc. v. Willingboro* 431 U.S. 85 (1977); *Va Pharmacy Bd. v. Va Consumer Council* 425 U.S. 748 (1976). Here, the practice of the California Commission has been to suppress all information contrary

to its position on controversial feminist issues, even in response to public inquiry.[1] Such government censorship of opposing viewpoints has rendered the Commission's speech partisan, inaccurate and unfair, at best, and at

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[1]The Commission replied to numerous public inquiries about the Equal Rights Amendment and about the prospect of California, rescinding it as some other states were doing. (Exhibits "43, 44")

To the Board of Global Ministries, United Methodist Church "Both the governor and the California Commission on the Status of Women support the Equal Rights Amendment . . . We are heartened that organizations such as yours are taking time to write to the governor of those states which have not ratified and urging them to do so." Exhibit 43, p. 01475.

To P. D. Chilcott "We too consider the national ratification of Equal Rights Amendments an absolutely top priority . . . There is still a great deal to be done to assist other states in bringing about final national ratification." Exhibit 43, p. 01495.

To Dovie Thompson "We are sorry that you oppose the ERA, since so many women believe it will help their economic status. Enclosed is an informative pamphlet which may be of interest to you." Exhibit 43, p. 01446.

To Teresa M. Collins "[Governor Brown] would not support [the amendment] if he felt it would undermine the family since he feels it is important to the nation that families be strengthened." Exhibit 43, p. 01164.

To Pat Saulton "We have observed that letters from constituents are most important in galvanizing support for controversial measures and certainly the ERA's passage will not come easily." Exhibit 43, p. 01447.

To Debi Langston who questioned whether the Equal Rights Amendment contained things that affect issues other than women's rights, the commission replied "As you can see, it is a very simple amendment and merely adds "sex" to those categories of persons already protected by constitutional law." Exhibit 43, p. 01167.

To Dwayne Trentman "It appears that this very simple amendment has been unduly distorted by the press and by others who wish to confuse the issue." Exhibit 43, p. 01169.

Exhibit 43 also contains many letters of inquiry from the public about the Equal Rights Amendment, the replies to which were not

worst, untruthful. "Untruthful speech, commercial or otherwise, has never been protected for its own sake" *Va Pharmacy Bd., supra* 425 U.S. at p. 771 citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340 (1974) and *Konigsberg v.*

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furnished by the commission. Along with many replies, however, that were furnished, it is clear that the promotional Equal Rights Amendment brochures were sent to numerous members of the public. (Exhibits 34 and 35) See Exhibit 43, pp. 001125, 00014, 00114, 00010, 00028, 00039, 00009, 00115.

To Mrs. Raymond Ridder "We too are saddened to see that the ERA is so wrongfully misinterpreted." Exhibit 43, p. 01445.

To Solveig Pearce "It is nice to hear from a feminist as young as you are, I'm enclosing a brochure." Exhibit 43, p. 01371.

With respect to inquiries addressed to the commission about the prospect of rescinding California's vote, a form letter reply was typically sent such as that to Marjorie C. Clark. "However the issue of legal equality was voted on by the state legislature in 1972 and cannot be reconsidered. According to constitutional experts, Article V of the Constitution confirms that only the affirmative vote "to ratify" an amendment has any binding effect. Therefore, a negative vote can always be changed, but ratification is final and not subject to rescission. Legal experts also agree that ongoing marriages and the family life within the structure will not be affected by the Equal Rights Amendment." Exhibit 44, p. 00063. (emphasis added)

To Cheryl Johnson who asked what she could do to assist in the Stop ERA movement, the commission replied, "I am not aware of any particular organization in your area which is involved in a movement to rescind the ERA in California. As you may know, there have been federal and state cases which raise questions regarding the legality of rescinding an amendment to the Constitution once a state has ratified. A recent written opinion of attorney Evelle J. Younger (No. CV75/207) indicates that the 1972 ratification exhausted legal action which is allowed by the State of California. Exhibit 44, p. 01478.

The replies to Ms. Clark and to Ms. Johnson are false because there were many groups in California known to the Commission assisting in the Stop ERA movement and because the November 6, 1975 attorney general's opinion by Evelle J. Younger stated that rescission was a federal political issue within the exclusive realm of Congress so that it was impossible to predict what the effect of rescission by the various states would be. (Exhibit 45)

State Bar 366 U.S. 36, 49, and n. 10 (1961). In *Robert Welch Inc., supra,* this court said: "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues." 418 U.S. at p. 340. This is particularly true when deliberate bias emanates from a government political agency masquerading as a "commission" which the public naively expects to tell the truth. More than a mere expectation, the public has a First Amendment right to hear the truth unimpeded by government. *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555, 579 (1980); *Globe Newspaper Co. v. Superior Court* 457 U.S. 596 (1982) see "Right to Know Why" 17 Harv. Civil Rights Civil Liberties L.Rev. 297 (1982).

Also part of the First Amendment is the right to be free from compelled associations. This means that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological or personal grounds. *Abood v. Detroit Board of Education* 430 U.S. 705, 714-715 (1977); *West Virginia State Board of Education v. Barnette* 319 U.S. 624, 642 (1943); *Elrod v. Burns* 427 U.S. 705, 717 (1977); *Buckley v. Valeo* 424 U.S. 1 (1976); *Police Department of Chicago v. Mosley* 408 U.S. 92, 96 (1972); *Stanson v. Mott* 17 Cal. 3d 206, 210-211, 219 (1976); *Miller I* 87 Cal. App. 3d at pp. 764-766. For over fifteen years, the California Commission on the Status of Women has liberally used exacted taxes to promote the political and social ideology of radical feminism at the expense of the strongly held moral, ideological and personal convictions of women opposed to state subsidized abortion, state subsidized child care, state promotion of the Equal Rights Amendment, state endorsement of equal pay for work of comparable worth, state funded abortion and contraceptive information and services for minors, state endorsement of "alternative lifestyles," state celebration of career women over homemakers, and the state's

elimination of all legal distinction between the sexes, thus making men and women into beings not only equal but alike. Societal changes in mores and values should be the product of free market forces, not the result of government manipulation. The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections: *Abood supra* 431 US at p. 235.

In addition to appellants' rights of access to the truth and their freedom from compelled association, and despite the absence of any government First Amendment right, the Court of Appeal on no authority but that of a commentator, merely states that even if government must regulate expressive activity with an even hand it does not need to be ideologically neutral.[2] 151 Cal. App. 3d at p. 700.

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[2]A more recent California Court of Appeal opinion prohibited Los Angeles County from allowing 16,500 aborted fetuses to be buried in a private cemetery at no cost to the county. The court held that the First Amendment required the state to be politically neutral.

> The proposed burial at Valhalla does not present any administrative entanglement with religion since the district attorney plans to deliver the fetuses and leave. It does, however, cause political entanglement. The abortion issue is one of the most emotionally explosive issues in today's political firmament. The appearance of support by the state, of one side of this controversy over the other, is improper political entanglement. The act of indirectly turning the fetuses over to Valhalla for religious burial as murdered humans would vitiate the studied neutrality.

First, it is the *state's* expressive activity of which appellants complain, as well as its comparative regulation of the expressive activity of others. Second, appellants do not challenge promotional speech by avowed political components of government. Third, the court begs the question to be decided by stating that government need not be ideologically neutral.

To the contrary, in *Wooley v. Maynard,* 430 U.S. 705 (1977), this Court upheld an injunction preventing the prosecution of Jehovah Witnesses for obscuring the message "Live Free or Die" on their New Hampshire automobile license plates:

> The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper "appreciation of history, state pride, [and] individualism." Of course, the State may legitimately pursue such interests in any number of ways. *However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.* 430 U.S. at p. 717 (emphasis added)

The evil in allowing state funds to propagate a particular ideology or viewpoint on matters of public importance was well stated in *Mountain States Legal Foundation v. Denver School Dist.,* 459 F.Supp. 357 (D. Colo 1978), where the court, relying heavily upon *Stanson v. Mott, supra,* enjoined a school district from implementing a resolution authorizing an expenditure of district funds to defeat a proposed constitutional amendment:

Feminist Womens Health Center, Inc., et al v. Robert H. Philibosian, etc., et al. Cal. Court of Appeal, Second Appellate District, Division Four, 2 Civil 69839 June 29, 1984 at Slip Op. p. 23. Certified for publication.

> . . . use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment of those fundamental freedoms. 459 F.Supp. at p. 360-361.

The feminist creed ordained by the Commission treads on the same quality of constitutional interests: the right of taxpayers not to support, promote or parade offensive state ideology, whether it is merely added to other creeds or achieves orthodoxy by the state's imprimatur. Otherwise, appellants would be forced to establish as government policy the feminist views of the National Organization of Women. If those views have any merit, they will need no help from the state. If they have no merit they will deserve no help from the state. The merits of any sociological movement or political cause are not to be decided by the state, but in a marketplace of ideas free from government hucksters.

B. The Fourteenth Amendment Right to Equal Protection of the Laws

The Court of Appeal dismissed appellants' equal protection argument on the basis that the Commission's advocacy of feminist measures was not a gender preference, but a remedial application of public resources to promote equality. *Miller II* at p. 699.

Plaintiffs are not opposed, as the court erroneously claims, to equal opportunity for women *(Miller II* at p. 699). Plaintiffs simply do not equate political feminism with a national value deserving official veneration *(Miller II* at p. 701).

Neither the court's nor the legislature's mere recital that the Commission is remedial makes it so. The Commission did not prove how its work was remedial of anything. "The mere recitation of a benign compensatory purpose is not an automatic shield which protects against

any inquiry into the actual purposes underlying the statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975).

The Commission, of course, wants to have its way at every turn; "gender preference" in its favor and "equality" in its defense. According to Justice Stewart (retired), "[T]he female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." 11 Pepperdine L.Rev. 421, 438 (1984).

That kind of paternalism is inherent in the California statutes establishing the Commission. It displays "archaic and stereotypic notions" of women's pre-Nineteenth Amendment lack of franchise. The statutory recital said to justify the gender preference of a state agency in § 8240[3] is no different from the statutory recital found insufficient to support the gender preference of a state school in *Mississippi University for Women v. Hogan* 458 U.S. 718, 719, 730 (1982) ns. 1, 16.[4] Both the single sex state nursing

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[3]The Legislature finds and declares that despite the fact that women apparently have greater equality in California than in many states, they still are not able to contribute to society according to their full potential. With a view to developing recommendations which will enable women to make the maximum contribution to society, the Legislature has created the Commission on the Status of Women.

[4]The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life. Miss. Code Ann. § 37-117-3 (1972).

school in *Hogan* and the Commission in this case, perpetuate the stereotypical myth that women, a voting majority, are dependent on government paternalism and preference for educational and societal opportunity. The California statute is worse since it is an open-ended platitude devoid of meaning. The vagueness of the recital renders it not only benign, but inscrutable. The recital is on its face incapable of meeting the *Hogan* test that the "compensation for past discrimination" recital be related to a factual showing that women suffered a disadvantage "related to the classification." 458 U.S. at p. 730. Since it is impossible to tell to what the classification applies other than to all women, the compensatory recital is meaningless. Many women, as do appellants, believe that women have not only been able to contribute to their full potential, but that the Commission is actively interfering with women's maximum contribution to society. They object to the Commission's efforts to mislead women into believing that their maximum contribution is to become stereotypic feminists.

The statutory gender preference schemes voided in *Reed v. Reed* 404 U.S. 71 (1971), *Craig v. Boren* 429 U.S. 190 (1976), *Frontier v. Richardson* 411 U.S. 677 (1973), *Weinberger v. Wiesenfeld* 420 U.S. 636 (1975), and *Hogan, supra* at least had some rational justification. Here there is only a meaningless statutory recital. Where statutory remedial preference has been upheld, the justification was readily demonstrable and applied in only limited and specific circumstances. *Califano v. Webster* 430 U.S. 313 (1977), *Schlesinger v. Ballard* 419 U.S. 498 (1975).

The state has the burden to establish an "exceedingly persuasive justification" to sustain the gender-based classification. *Hogan, supra* 458 U.S. at p. 731. In this case, more than in *Hogan,* the state has fallen far short of doing so. Accordingly, the statutes establishing the Commission and authorizing its political advocacy solely on behalf of women are repugnant to the United States Constitution and should be voided.

CONCLUSION

The more controversial and sensitive the issues debated, the more fundamentally necessary it is to exclude government promotional speech from the dialogue. Even private lobbying is so threatening to the legislative process that it is widely regulated. California Political Reform Act of 1974, Government Code §§ 81000-91014; The Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-454; 5 U.S.C. § 4107(b)(i) (public funds prohibited to train private employees at non-government facilities in "carrying on propaganda, or otherwise attempting to influence legislation"); 22 U.S.C. § 614(b) (public domain closed to foreign propaganda); Internal Revenue Code § 501(c)(3) (tax exemption premised on activity, no substantial part of which "is carrying on propaganda, or otherwise attempting to influence legislation. . . ."). Controversy has swirled around allegations that the Legal Services Corporation has unlawfully used public funds to lobby. *U.S. News & World Report,* October 31, 1983, p. 66-67.

Neutrality and nonpartisanship are not impossible ideals, even in state election matters *Unger v. Superior Court* 102 CA 2d 681 (1980) (Unger I); *Unger v. Superior Court* 1st DCA 7/19/83 (Unger II) (preserving under California Constitution Article II § 6 nonpartisan school office and judicial elections, respectively.) Cal. Election Code §§ 3525-3567, 3570, 3578, 3714, 4015, 4015.5, 4018, 5012-5016, 5151, 5157.5. Like federal agencies and employees, federal grantees and contractors are expected to execute programs of the government without bias or favoritism for or against any political party. *C.S.C. v. National Association of Letter Carriers,* 413 U.S. 548, 565 (1973).

The general rule is that federal funds may not be used for lobbying 18 U.S.C. § 1913.[5] The federal statute implies a distinction between lobbying and communicating accurate information, the same distinction expressly made by the Superior Court judgment but eliminated by the Court of Appeal in construing new Government Code § 8246. The federal statute allows communication requested by Congress deemed necessary for public business. Existing law in California prior to § 8246 authorized only agency lobbying for paraphernalia, not for causes. Government Code §§ 50023, 53060.5. The rationale of restricting lobbying activities is to protect the unrecognized voice of the people from the organized voice of special interests, including those lodged in state agencies.

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[5]No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business. 18 U.S.C. § 1913.

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. *United States v. Harriss,* 347 U.S. 612, 625 (1953)

The threat is more serious when the masquerading party is a government agency. To continue to allow the Commission to promote the feminist protocol at public expense while masquerading as the public servant of all the women of California violates the public policy of California applicable to government agencies:

> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. Gov. Code § 54950.

Under the record in *Miller II*, the people do not know that the Commission is congenitally biased in favor of the feminist political movement. They naively tend to assume that a government agency is unbiased, impartial and fair. The Commission's demonstrated bias also violates Article I § 3 of the California Constitution: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." There is no provision for the state or its agencies to instruct the people's representatives. Any agency's funds, personnel or literature employed in lobbying the legislature (as opposed to supplying factual information requested by the legislature) diminishes to that extent the effectiveness of the people's right to instruct their representatives.

The dangers of agency lobbying require careful circumscription so that government hyperbole is not mistaken by the legislature for accurate information. Misrepresentation by a government agency, of course, can never be tolerated.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics*, nationalism, religion, *or other matters of opinion* or force citizens to confess by word or act their faith therein."

* * *

Jefferson agreed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood, supra*, 431 U.S. at p. 235 (emphasis added).

Dated: July , 1984.

HUNTER, PETERSON & BURTON

THOMAS M. BURTON

(Appendices to follow)

Appendix A

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

RITA MILLER, DORIS ALLEN, HOLMES CROUCH, CARL NOLLER, ROBERTA ALLEN, GLORIA GILLOGLEY and THE WOMEN'S COMMITTEE FOR RESPONSIBLE GOVERNMENT,	)	
Plaintiffs and Respondents, and Cross Appellants,	)	
vs.	)	3 Civ. 22046
THE CALIFORNIA COMMISSION ON THE STATUS OF WOMEN,	)	
Defendant and Appellant, and Cross Respondent.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rita Miller, Doris Allen, Holmes Crouch, Carl Noller, Roberta Allen, Gloria Gillogley and The Women's Committee for Responsible Government, the respondents and cross

appellants above named, hereby appeal to the Supreme Court of the United States from the final decision of this court entered February 3, 1984. The time for hearing was extended by the California Supreme Court until May 3, 1984 or until the court acted, which it did by denying a hearing on April 26, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 19, 1984.

HUNTER, PETERSON & BURTON

/s/ T. M. Burton

Thomas M. Burton
Bank of America Building,
Suite 1007
101 Park Center Plaza
San Jose, California 95113
Telephone: (408) 286-5868

Appendix B

3rd Civil No. 22046

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

MILLER ET AL.

v.

CALIFORNIA COMMISSION ON THE

STATUS OF WOMEN

REYNOSO, J., DID NOT PARTICIPATE

The motion for this court to transfer the above entitled cause to itself and/or stay the remittitur is DENIED.

SUPREME COURT
Filed
Apr 26 1984
Laurence P. Gill

/s/ Bird
Chief Justice

IN THE

COURT OF APPEAL OF

THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

MILLER, et al.

vs. 3 Civil 22046

CALIFORNIA COMMISSION ON
THE STATUS OF WOMEN

By the Court:

Respondents, cross-appellants' petition for rehearing is denied.

Dated: February 28, 1984

Puglia, P. J.

[151 Cal.App.3d 693]

[Civ. No. 22046. Third Dist. Feb. 3, 1984.]

RITA MILLER et al., Plaintiffs and Appellants, v.
CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, Defendant and Appellant.

Opinion

BLEASE, J.--Plaintiffs are disgruntled with the views and activities of the California Commission on the Status of Women (Gov. Code, § 8240),[1] chiefly its support of a proposed Equal Rights Amendment (ERA) to the federal constitution. They filed this taxpayer's action for declaratory and

[151 Cal.App.3d 696]

injunctive relief seeking to abolish the commission or, failing that, to prohibit it from lobbying or promoting its views

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[1]All statutory references are to the Government Code, unless otherwise noted.

concerning actions the commission deems appropriate to improve the status of women. The trial court denied relief aimed at abolition of the commission but granted judgment for plaintiffs encompassing the alternate relief they sought. The commission appeals from the judgment. Plaintiffs cross-appeal from the denial of their paramount request.

I

In 1965 the California Legislature adopted an act creating the Advisory Commission on the Status of Women to study various subjects, including employment conditions, relating to the equality of treatment of women and to report its recommendations to the Legislature. (Stats. 1965, ch. 1378, pp. 3283-3285.) In 1969 the Legislature amended the act to specify additional functions of the commission (Stats. 1969, ch. 721, § 6, p. 1415.) In 1971 the act was amended to

create the Commission on the Status of Women and to add yet other duties. (Stats. 1971, ch. 541, pp. 1050-1052.) The legislation was codified in the Government Code in 1977. (Stats. 1977, ch. 579, § 65, pp. 1857-1858.)

In 1972 the Legislature ratified the proposed ERA (Stats. 1972, res. ch. 148, pp. 3440-3441) which provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." (Ibid.)[2] Plaintiffs filed the complaint in this action in November 1976, alleging the commission unlawfully promoted the ratification of the ERA in

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[2]The California Constitution contains a similar guarantee of rights. (Cal. Const., art. I, §§ 7, 8, Hardy v. Stump (1978) 21 Cal.3d 1, 7 [145 Cal. Rptr. 176, 576 P.2d 1342]; Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 20 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

California and elsewhere and illegally urged conformity of California's laws to the ERA standard.[3] They claim any such

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[3]The following is a synopsis of the allegations of plaintiffs' complaint. Prior to ratification of the ERA by California's Legislature the commission advocated this action to its members and to the public. In 1973 the commission "obtained passage" of Assembly Concurrent Resolution No. 33 creating a Joint Committee of Legal Equality. (See Stats. 1973, res. ch. 114, pp. 3242-3243, establishing a joint committee to study conforming California's laws "with the principle that equality of rights under the law shall not be denied or abridged on account of sex.") After 1973, the commission established a syndicated newspaper column entitled "A Woman Ought to Know" with a "partisan" slant in favor of the ERA and biased on other "political and controversial topics." Since 1973 the commission has prepared various materials for public consumption "to the end of implementing the legal and societal standards of the [ERA]." Since 1974 the commission has printed a newsletter for the purpose of supporting the ERA. In August of 1974 the newsletter stated falsely that legal authorities agree a state cannot rescind their ratification of the ERA. In January of 1975 the newsletter urged letters and contributions to the effort to obtain ratification of the ERA in seven other states. In August of 1975 the newsletter urged readers' attendance at an August rally at the

promotion is ultra

[151 Cal.App.3d 697]

vires or, alternatively, prohibited because it denied them constitutional rights to equal protection of the law and freedom of speech.

This court considered the controversy in Miller v. Miller (1978) 87 Cal. App.3d 762 [151 Cal.Rptr. 197] (Miller I) and reversed a summary judgment in favor of the commission, with two justices concluding the commission's "advocatory or promotional position on ERA" required "'clear and explicit' legislative authorization," which had not been shown. (Id., at pp. 771-772.) Thereafter, shortly after the rendering of the

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State Capitol Building and subsequent visits to legislators to ask for legislation conforming California laws to the ERA and to oppose rescission of California's ratification of ERA.

judgment here in issue, the Legislature enacted Government Code section 8246 (Stats. 1982, ch. 1118, § 1) which provides: "(a) The commission is expressly authorized to inform the Legislature of its position on any legislative proposal pending before the Legislature and to urge the introduction of legislative proposals.

"(b) The commission is expressly authorized to state its position and viewpoint on issues developed in the performance of its duties and responsibilities as specified in this chapter.

"(c) This section is declaratory of existing law."

(1) The case, as framed by only to the future. Accordingly, we address the matter in the present tense, cognizant of the most recent expression of legislative

will.[4] (See, e.g., White v. Davis (1975) 13 Cal.3d 757, 773 [120 Cal.Rptr. 94, 533 P.2d 222], fn. 8; cf. Selby Realty Co. v. City of Buenaventura (1973) 10 Cal.3d 110, 125 [109 Cal.Rptr. 799, 514 P.2d 111].)

In essence the judgment declares and orders that the commission must refrain from expressing to the Legislature or the public any opinion of its own on any issues of "[w]omen's educational and employment problems, needs, and opportunities." The commission is relegated thereby to the status of a librarian, a collector and indexer of data and opinions of others on these subjects. The authority advanced for this ban is Miller I.

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[4]We note the matter of attorney fees was reserved by the trial court. We intimate no view on the timing or resolution of that matter.

Miller I, however, is no longer authority for such claims; the enactment of section 8246 has cut the ground from beneath it. The commission is now "expressly authorized to state its position and viewpoint on issues developed in the performance of its duties and responsibilities" (§ 8246, subd. (b)),

[151 Cal.App.3d 698]

which are broadly set forth in section 8245.[5] The authorization for the

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[5]Section 8245 provides: (a) The Commission shall study the following:

"(1) Women's educational and employment problems, needs and opportunties.

"(2) State laws in regard to the civil and political rights of women, including pensions, tax requirements, property rights, marriage and dissolution of marriage provisions, and similar matters.

"(3) The effect of social attitudes and pressures and economic considerations in shaping the roles to be assumed by women in the society.

commission to speak its mind "on issues"

developed on these matters can only be

"(4) Any laws, practices, or conditions concerning or affecting women which impose special limitations or burdens upon them or upon society, or which limit or tend to limit opportunities available to women.

"(b) The commission shall act as an information center on the status of women and women's educational, employment, and other related needs.

"(c) The commission shall recommend, develop, prepare, or coordinate materials, projects, or other activities, and shall give technical and consultative advice to public or private groups or persons concerned with any of the following:

"(1) Preventing or minimizing problems brought about by the changing roles and responsibilities of women.

"(2) Developing programs to encourage and enable women to be fully contributing members of society.

"(d) A prime function of the commission shall be to encourage women's organizations and other groups to institute local self-help activities designed to meet women's educational, employment, and related needs. The commission shall make reports on its activities, findings, and recommendations to the Legislature

interpreted as a legislative warrant to advocate and promote the commission's position on these subjects.

Plaintiffs' sole rejoinder to the new legislation is the remarkable assertion that, notwithstanding the plain language of the statute, because subdivision (c) of section 8246 states the section is declaratory of existing law, the Legislature intended to endorse the judgment of the trial court.[6] Why the

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from time to time, but not less often than every odd-numbered year.

[6]The legislative counsel's digest accompanying the bill would have led those legislators who read it to believe they were acting specifically to correct the existing case law:

"SB 1499, Rains. State agencies.

"Existing case law interprets the provisions of law applicable to the Commission on the Status of Women as not authorizing the commission to inform the legislature of its position on legislative proposals, or to express a

Legislature would have amended the statute to indulge a redundancy is not explained. The words read otherwise.

We do not imply that a legislative warrant for promotional activity is wholly insulated from all but constitutional reproof. We doubt the warrant was intended to authorize advocacy of election of candidates for public office based upon their stand on matters affecting the status of women. Be

[151 Cal.App.3d 699]

that as it may, no allegation of improper

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particular viewpoint on issues within the scope of its responsibilities, among other things.

"This bill would expressly authorize the commission to inform the legislature of its position on pending legislative proposals, to urge their introduction, and to express a viewpoint on issues within the scope of its responsbilities." (Stats. 1982, ch. 1118, No. 6 Deering's Adv. Legis. Service, p. 972.)

promotional activities is made out by plaintiffs' pleadings. Their complaint lies on a more generalized plane: that any advocacy or promotion by the commission of its views on such matters is prohibited. On that plane their remaining arguments are addressed to the Constitution. We turn to them.

II

Plaintiffs make two constitutional claims in support of the judgment and in support of its extension to abolish the commission. **(2a)** They contend the very establishment of a commission on the status of women runs afoul of state and federal constitutional precepts of equal protection of the law. **(3a)** Alternatively, they contend permitting the commission to speak its views on controversial "women's issues" infringes their constitutional right to freedom of speech. **(2b), (3b)** Neither contention

has merit.[7]

(2c) Plaintiffs' equal protection contention is but an attempt to hoist the commission with its own petar. They reason "[p]reference of women over men in the application of public resources is just as invalid as excluding women from their benefits," relying on Sail'er Inn, Inc. v. Kirby, supra, 5 Cal.3d 1 and Arp v. Workers' Comp. Appeals Bd. (1977) 19 Cal.3d 395 [138 Cal.Rptr. 293, 563 P.2d 849]. They read the law as judging any gender classification or gender preference suspect and sustainable only on a showing of compelling state interest. But the use of gender-framed measures, supported by public resources, to remedy gender bias serves the interests of equality protected by our

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[7]We note the trial court rejected both constitutional claims.

Constitution.[8] As the California Supreme Court observed in the course of equal protection analysis, "[s]ociety is belated in its recognition of the baseless prejudice inherent in longstanding notions of woman's proper social and economic roles . . . ." (Arp, supra, 19 Cal.3d at p. 405; italics added.)

The use of public resources for the establishment of a commission to develop and advocate measures to foster the economic and social equality of women is not a preference of women over men in the application of public resources. Its purpose is the fulfillment of constitutional principles of equality. That is

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[8]A more gender-neutral title might have been selected for the commission. For example, it could have been called the Commission on the Status of Persons Historically, Socially and Economically Disadvantaged on Grounds of Gender. The gender-neutral precept of the equal protection clause does not compel such neutered diction.

the heart of plaintiffs' problem, for their view is that equality (in employment, etc.) itself trenches upon values they hold dear.[9]

[151 Cal.App.3d 700]

This position is made clear by their next argument, which they clothe in First Amendment dress.

III

(3c) Plaintiffs submit that: "[i]mplicit in the statements and conduct of the Commission is the feminist ethic that woman's maximum contribution to society is her productive labor which necessarily increases her financial

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[9]We do not imply that the beneficent purpose behind the establishment of the commission can wholly insulate its actions from equal protection scrutiny. However, plaintiffs do not point to any action of the commission which grants women an invidious gender-based preference. It is the very existence of a commission which advocates remedial measures which they view as an improper preference.

independence and serves as the pretext to emancipate her from unwanted child bearing, child rearing and domestic confinement." This perceived ethos[10] conflicts with plaintiffs' view that: "women's maximum contribution to society [is] the bearing and rearing of the future of the race . . . ." They ask that we "not allow the Commission to use its preferred position and funding to enhance without any defined limit its own

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[10]We note in passing the commission witnesses, past chair Anita Miller, appointed by then-Governor Reagan in 1972, and Pamela Faust, the staff director of the commission since 1973 hotly disputed this characterization of the commission's point of view at trial. Miller said: "I don't think the commission encouraged women to make any particular choices [as to whether they should remain in the home or go in the work force] at all. I believe that what the commission did at all times was to attempt to articulate the possibilities for women making whatever choices they wished to make for themselves." Faust concurred: "The commission has never taken a position of telling individual women what they ought to do."

speech to the detriment of plaintiffs' right both to speak in opposition to the Commission and their right not to enhance the Commission's speech by tax support."

This claim fails to make the critical First Amendment distinction between the "[g]overnment's [a]ddition of its [o]wn [v]oice [and the] [g]overnment's [s]ilencing of [o]thers." (See Tribe, American Constituional Law (1978) p. 588.) **(4)** "That government must regulate expressive activity with an even hand if it regulates such activity at all does not mean that government must be ideologically 'neutral.'" (Ibid.; also see Shiffrin, Government Speech (1980) 27 UCLA L.Rev. 565; see generally Ziegler, Government Speech and the Constitution: The Limits of Official Partisanship (1980) 21 B.C. L.Rev. 578.) **(5a)** Ordinarily, government may not compel citizens to express a view any

more than it may forbid someone to express a view. (See, e.g., West Virginia State Bd. of Edu. v. Barnette (1943) 319 U.S. 624 [87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674].) **(6)** And, it may not delegate the authority to a nongovernmental entity to extract funds for support of political and ideological activity not directly related to the purpose for which the entity is given the power to levy. (See Abood v. Detroit Board of Education (1977) 431 U.S. 209 [52 L.Ed.2d 261, 97 S.Ct. 1782].)

(5b) "But none of this means that government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication. The first amendment does not, for example, prevent government

[151 Cal.App.3d 701]

from promoting respect for the flag by proclaiming Flag Day or by using public

property to display the flag. Those who disdain the national symbol may express that view but may not silence government's affirmation of national values, nor may they insist that government give equal circulation to their viewpoint--any more than they may insist that the flags of their choice be flown alongside the American flags that ring the Washington Monument. And if government expends public funds to subsidize flag production, the fact that some people object to this expenditure of their tax money to propagate the state's patriotic message is likely to be deemed irrelevant, either in a challenge to the expenditure itself or in a challenge to the payment of the future amount of tax." (Tribe, supra, at p. 590; fns. omitted.)

(3d) The root problem with plaintiffs' free speech contention is that it proves too much. They offer no point of

distinction between government speech addressing the status of women and government speech on any other topic; save that they deem the topic of women's status "controversial." But, controversial or not, it is too late in the day to contend the economic and social status of women is not a legitimate topic of governmental concern.[11] If the government, i.e., the Governor and legislative leaders, cannot appoint a commission to speak on the topic without implicating plaintiffs' First Amendment rights it may not address any other "controversial" topics. If the government cannot address controversial topics it cannot govern.

"Government has legitimate interests in informing, in educating, and in persuading. If government is to

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[11] Indeed, one could say too late in the century. (See U.S. Const., 19th Amend.)

secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process." (Shiffrin, supra, 27 UCLA L.Rev. at p. 606; fn. omitted.)

The irrefutable need for government speech does not provide absolute license and in some guises government speech may have the effect of trammeling the free speech rights of others. In this regard, it is important to note what is not in issue here. This is not a circumstance in which government has established a forum for speech and is precluding some points of view from an equal opportunity

to be heard.[12] (See Kalven, The Concept of the Public Forum: Cox v. Louisiana, The Supreme Court Review (1965)

[151 Cal.App.3d 702]

p. 1; compare Police Department of Chicago v. Mosley (1972) 408 U.S. 92 [33 L.Ed.2d 212, 92 S.Ct. 2286], city may not permit labor picketing near school buildings and outlaw all other picketing.) To analogize the commission to such a public forum would lead to far-reaching possibilities; for example, must the federal Department of Defense permit an equal opportunity for pacifists to rebut its

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[12]We note by statute "[a]ll meetings of the commission shall be open and public and all persons shall be permitted to attend any meetings of the commission." (§ 8243.) To the extent that portions of such meetings may provide a public forum plaintiffs tender no claim of exclusion. They admit they never sought to air their views before the commission, and never attended a commission meeting.

views in the myriad of statements and publications it produces? (See Shiffrin, supra, 27 UCLA L.Rev. at p. 572 et seq.)

Neither have plaintiffs made out a case of government speech drowning out private communication. The speech activities of the commission are in essence these: responses to inquiries; lobbying legislators; circulation of a newsletter to persons and groups that ask to receive it, and issuance of press releases on "women's issues." Granting that the commission has engaged in advocacy and promotion of its views in the course of these activities, neither the scale of that speech nor the vehicles employed appear likely to drown out plaintiffs' contrary views. That the imprimatur of government has conferred an advantage upon the commissioners is undeniable. That advantage, however, has not risen to the level of drowning out plaintiffs.

Finally, this is not a case where government speech has entered the lists in a political controversy submitted to a vote of the people. We are told that when the electorate is to exercise its franchise there is a heightened need for constitutionally based judicial oversight to avoid "poisoning the well" of majoritarian principle. (See, e.g., Stanson v. Mott (1976) 17 Cal.3d 206, 219 [130 Cal.Rptr. 697, 551 P.2d 1].)

We perceive no reason grounded in plaintiff's right to freedom of speech to uphold or extend the judgment's mandate of neutrality in these circumstances. Plaintiffs' generalized umbrage is aimed at the ideological content of the commission's speech and not with the concept of a commission speaking about the status of women. To the extent plaintiffs take offense from the ideas of equality of social and economic opportunity for women

their remedy is amendment of the constitution, to reflect their views. To the extent they accept these ideas but desire to change the tone of the commission's speech, i.e., to emphasize how measures which may enhance the ability of women to choose to enter the work force may implicate other values, they must seek redress from the Legislature and the public officers to whom that body has granted the power to appoint members of the commission.[13]

The commission's composition is prescribed in section 8241: "There is in the state government the Commission on the Status of Women. The commission shall consist of 17 members: three Members of the Senate and one public member appointed by the Senate Committee on Rules, three Members of the Assembly and one public member appointed by the Speaker, the Superintendent of Public Instruction, the Chief of the Division of Industrial Welfare in the Department of Industrial Relations, and seven public members appointed by the Governor, with the consent of the Senate. The Members of the Legislature shall serve at the pleasure of the appointing powers.

The judgment is reversed.

Sparks, J., concurred.

PUGLIA, P. J.--I concur in the judgment.

The recent enactment of Government Code section 8246 (Stats. 1982, ch. 1118, § 1) is clearly a legislative response to the trial court's judgment and was plainly intended to supersede the trial court's more narrow interpretation of the commission's authority. The judgment

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"Public member appointees of the Speaker and the Senate Committee on Rules, and appointees of the Governor shall serve four-year terms. All persons appointed pursuant to Section 2 of Chapter 1378 of the Statutes of 1965, as amended by Chapter 382 of the Statutes of 1973, shall continue in office until the expiration of their term and the appointment of their successors. The appointing powers may reappoint a member whose term has expired, and shall immediately fill any vacancy for the unexpired portion of the term in which it occurs.

"All appointees shall hold office until the appointment of their successors.

below prohibits the commission "from expressing to the Legislature or the public any opinion of its own on any issues of '[w]omen's educational and employment problems, needs, and opportunities.'" (Maj. opn., ante, p. 697.) Giving effect to newly added Government Code section 8246, I agree the judgment cannot stand.

In Miller v. Miller (1978) 87 Cal. App.3d 762 [151 Cal.Rptr. 197] (Miller I), we held that plaintiff's showing that the commission had spent public funds to promote the Equal Rights Amendment was adequate to defeat the commission's motion for summary judgment, because such conduct would constitute unlawful election campaigning in the absence of "clear and explicit" legislative authorization for such activity. (Pp. 771-772.) Summary judgment was therefore reversed. After plenary trial the court made

findings and rendered the judgment from which this appeal is taken. In its findings and judgment, the trial court did not expressly address the issue of expenditure of public funds for election campaigning considered by this court in Miller I. It did find that "some of the activities of the Commission and its members . . . have been in excess of the statutory authority and purposes for which the Commission was established" and that "such activities have involved the expenditure of public funds . . . ." The court further found, however, "that evidence as to the extent of the expenditure of public funds is insufficient upon which to base a judgment . . . ." Plaintiff's cross-appeal does not challenge the latter finding.

The decision in Miller I affords no basis to deny full effect to the subsequent legislative clarification of the

commission's authority. Conversely,

[151 Cal.App.3d 704]

this appeal does not provide the occasion either to question or denigrate our holding in Miller I. The question of whether newly added Government Code section 8246 provides the commission "clear and explicit legislative authorization" to "expend public funds to promote a partisan position in an election campaign" (Miller I, 87 Cal.App.3d at p. 764, quoting Stanson v. Mott (1976) 17 Cal.3d 206, 209-210 [130 Cal.Rtpr. 697, 551 P.2d 1]) simply is not tendered by the record before us.

Appendix C

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

RITA S. MILLER, et al., Plaintiffs, vs. ANITA MILLER and THE CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, et al., Defendants.	NO. 264079 DEPT. 19 JUDGMENT

This matter came on regularly for trial by the Court sitting without a jury, in Department 19, the Hon. Lloyd A. Phillips, Jr., judge presiding. Plaintiffs appeared by their counsel, Thomas M. Burton, and defendants appeared by their counsel, George Deukmejian, Attorney General and Paul H. Dobson, Deputy Attorney General. The Court, having

heard and considered evidence, both oral and documentary, and having ordered briefing, took the matter under submission on April 21, 1982, after further argument of counsel.

GOOD CAUSE APPEARING, THE COURT, BEING FULLY ADVISED IN THE PREMISES, NOW DECLARES:

1. The provisions of Chapter 3.1 (commencing with Section 8240) of Division 1 of Title 2 of the Government Code, creating and setting forth the purposes, powers, and duties of the Commission on the Status of Women (hereinafter "the Commission"), do not violate the constitutional doctrine of separation of powers, privileges, and immunities, or equal protection. It is the finding of this Court that the Commission was validly created and is existing for the purposes set forth in Chapter 3.1.

2. The provisions of Chapter 3.1 are not unconstitutionally vague or uncertain; however, it is the opinion of this Court, as hereinafter set forth, that the provisions of said Chapter are subject to reasonable restrictions.

3. The Court finds that while some of the activities of the Commission and its members, both within and without the State of California, have been in excess of the statutory authority and purposes for which the Commission was established, it has not acted in such a manner as to deprive the plaintiffs of their rights of free speech, nor have plaintiffs' civil rights been violated thereby.

The Court finds that such activities have involved the expenditure of public funds, and to the extent that such activities have not presented an impartial viewpcint, they are not activities within the authority and purposes of the

Commission. However, the Court finds that evidence as to the extent of the expenditure of public funds is insufficient upon which to base a judgment, and, accordingly, the Court makes no finding thereon. Such activities do not comply with the mandate of Chapter 3.1 and violate the duty of the Commission to undertake its functions impartially, and to present neutrally, differing viewpoints of various individuals and groups within the population the Commission is designed to serve.

The Court declares that the activities of the Commission must be carried out within the authority and purposes set forth in the provisions of Cahpter 3.1. Specifically, the Court declares that the Commission shall:

a. When conducting studies pursuant to subdivision (a) of Section 8245 of the Government Code, study all sides

of each subject and consider, where they exist, opposing viewpoints with respect to such issues, and shall not expend public funds for the purpose of studying such subjects without giving equal consideration to all sides of the issue in question.

b. When acting as an information center pursuant to subdivision (b) of Section 8245, act impartially in gathering and disseminating information, refrain from presenting any particular viewpoint with respect to the information gathered or disseminated, and assure the availability of fair and impartial factual information regarding the issue in question.

c. When acting pursuant to subdivision (c) of Section 8245, assure that such materials, projects or other activities, and that such technical and consultative advice, is free from the

assertion of any particular point of view or political or partisan position with respect to any issue involved, and take such steps as may be necessary to assure that such materials, projects and activities are fairly and impartially constructed such that no particular position with respect to any issue is expressed or implied by the Commission.

d. When carrying out the functions described in subdivision (d) of Section 8245, set forth in neutral terms such self-help activities which have been or may be undertaken by organizations or groups with differing objectives and values concerning the particular issues or concerns being addressed by such groups.

e. In reporting its activities, findings and recommendations to the Legislature, include all the various viewpoints, approaches and objectives of

the population being served by the Commission, and to do so in a fair and impartial factual manner so as to present an unbiased report on the issues addressed.

4. The Court finds that the Commission is not the kind of agency designed to "devise legislative proposals to attempt to implement the current administration's policies."

> "[W]hile public agency 'lobbying' efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies. Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our

> Constitution leave to the 'free election' of the people (see Cal. Const., art. II, § 2), does present a serious threat to the integrity of the electoral process." Stanson v. Mott (1976) 17 Cal.3d 306, 218.

Unlike the agency involved in Stanson, supra, it is the opinion of this Court that the Commission's functions are more limited; and it is intended to be only an advisory and informational body. Thus, it has no power to 'lobby" to promote causes or even to engage in public agency lobbying, in the sense that it may propose specific legislation or recommend the passage or defeat of measures pending before the California Legislature or other legislative, quasi-legislative or regulatory agencies.

Because it is an informational, advisory body, the Commission may do no more than express the views on all sides of any particular issue and discuss the potential benefits or detriments of each

respective viewpoint. Its function in making recommendations to public and private bodies is to point out those areas which in the view of the Commission merit the attention of legislative, quasi-legislative or regulatory agencies or which call for individual programs or projects by local or statewide public and private agencies.

5. IT IS HEREBY ORDERED that the Commission on the Status of Women, its officers, agents and employees be, and they are hereby permanently restrained and enjoined from engaging in any activity in its official capacity, or with the use of public funds, without or in excess of the authority granted in Chapter 3.1 as declared and defined in this Judgment, and IT IS THE FURTHER ORDER OF THIS COURT that the officers and employees of the Commission shall, when acting in their individual capacity, refrain from making

any representation which expresses or implies that they are acting in their official capacity, or are representing the Commission or its viewpoints.

6. IT IS FURTHER ORDERED that this action as to defendant Anita Miller, individually, be and it is hereby dismissed as moot.

7. IT IS FURTHER ORDERED that plaintiffs have and recover their costs of suit herein incurred.

8. IT IS FURTHER ORDERED that plaintiffs shall have and recover reasonable attorney fees, the Court hereby reserving jurisdiction to amend this Judgment to include reasonable attorney fees as shall be determined by the Court upon noticed motion and hearing thereon.

DATED: Jul 2 1982

Lloyd A. Phillips, Jr.
JUDGE OF THE SUPERIOR COURT

[Civ. No. 17226. Third Dist. Dec. 22, 1978.]

RITA S. MILLER et al., Plaintiffs and Appellants, v.
ANITA MILLER, as Chairperson, etc., et al., Defendants and Respondents.

Summary

Plaintiffs brought an action challenging the expenditure of public funds by the California Commission on the Status of Women to promote ratification of the proposed Equal Rights Amendment to the United States Constitution. Plaintiffs relied in part on the rule that, at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign. The commission acknowledged that it was openly and actively involved in the promotion nationally of ratification of the Equal Rights Amendment (and opposition to its

rescission in states which had previously ratified it) both at the legislative and the grass-roots level. The trial court granted defendants' motion for summary judgment. (Superior Court of Sacramento County, No. 264076, Frances N. Carr, Judge.)

The Court of Appeal reversed. The court held plaintiffs made an adequate showing on the summary judgment motion that the commission's activities involved election campaigning and not merely legislative lobbying. The court explained that election campaigning and legislative lobbying are distinguished not by the objective of the promotional activity, but the audience to which that activity is directed. Accordingly, the court held clear and explicit legislative authorization for the commission's advocatory or promotional position on the Equal Rights Amendment was needed, and

nothing in the applicable statute clearly and explicitly authorized the commission to urge the public to support the passage of legislative or constitutional measures. Therefore, the court held any expenditures of public funds to marshal public support for the amendment were unauthorized, and the trial court erred in granting summary judgment. (Opinion by Paras, J., with Puglia, P. J., concurring. Separate concurring opinion by Reynoso, J.)

Headnotes

Classified to California Digest of Official Reports, 3d Series

(1) Public Funds § 6--Illegal Expenditures--Advocating Ratification of Constitutional Amendment.--At least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a

partisan position in an election campaign. It is not the objective of the promotional activity but the audience to which it is directed that distinguishes legitimate legislative lobbying from prohibited electoral activities. Accordingly, in an action challenging the expenditure of public funds by the California Commission on the Status of Women to promote ratification of the proposed Equal Rights Amendment to the United States Constitution, the trial court erred in granting defendant's motion for summary judgment, where plaintiffs made an adequate showing that the commission's activities involved election campaigning and not merely legislative lobbying. Thus, clear and explicit legislative authorization for the commission's

challenged activities was needed, but was not supplied by statutes giving it broad powers to do anything "which may be necessary, desirable, or proper to carry out the purposes of this chapter." Since nothing else in the statutes clearly and explicitly authorized the commission to urge the public to support the passage of legislative or constitutional measures, any expenditures of public funds to marshal public support for the amendment were unauthorized.

[See **Cal.Jur.2d,** Public Funds, §§ 8, 9; **Am.Jur.2d,** Lobbying, § 14.]

Counsel

Hancock, Rothert & Bunshoft and Thomas M. Burton for Plaintiffs and Appelants

Evelle J. Younger and George Deukmejian, Attorneys General, Warren J. Abbott,

Assistant Attorney General, Katherine E. Stone and Marian M. Johnston, Deputy Attorneys General, for Defendants and Respondents.

Opinion

PARAS, J.--In Stanson v. Mott (1976) 17 Cal.3d 206, 209-210 [130 Cal.Rptr. 697, 551 P.2d 1], our Supreme Court ruled that ". . . at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign . . . ." Relying in part upon Stanson, plaintiffs challenge the expenditure of public funds by the California Commission on the Status of Women (Commission) to promote ratification of the proposed Equal Rights Amendment (ERA) to the United States Constitution. Plaintiffs appeal after the superior court granted defendants' motion for summary judgment.

In the course and as part of its

presentation of the motion, the defendant Commission admitted the following:

"1. The defendant CALIFORNIA COMMISSION ON THE STATUS OF WOMEN ('COMMISSION') is a commission of the State of California recognized and existing by virtue of chapter 541 of the California Statutes of 1971. [Gov. Code, §§ 8220-8225.]

"2. Anita Miller is and has been since June, 1972 a public member and Chairperson of the Commission. Anita Miller was director of the 'Project'[1]

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[1]The "Project" is the Equal Rights Project of the Rockefeller Foundation, which furnished a grant to the Commission "to study the societal impact of conformance to the Equal Rights Amendment." The Commission is authorized to accept such grants by Government Code section 8224 subdivision (f). Defendants assert that a special account was established for the Project, and Commission funds were never intermingled with Project funds. All work relative to the Project was paid for with Rockefeller Foundation funds. A publication known as The Equal Rights

from April 1, 1974 through March 31, 1976.

"3. The primary legislative concern of the Commission in 1972 was ratification by California of the Equal Rights Amendment to the United States Constitution.

"4. The Commission has coordinated efforts of the California Legislative Roundtable representing 17 major women's organizations and 153,000 California women toward ratification.

"5. The Commission has disseminated its view in favor of the Amendment through the media and by the 'public appearance and pronouncements of its members and staff.

"6. From and after 1973, the Commission established as its highest

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Monitor was for a time published by the Project.

priority the final ratification of the Equal Rights Amendment by the necessary additional states for it to become law, and pledged itself to assist wherever possible [italics in original], efforts in states other than California to ratify the Amendment. It also determined to develop 'public understanding' of the Equal Rights Amendment through speeches, publications and other publicity material, to analyze the societal impact of conformance of California laws to the Equal Rights Amendment.

"7. The Commission by the 'Project" commissioned articles by legal and other scholars concerning the Equal Rights Amendment; that is has prepared brochures, white papers, newspaper articles, radio tapes, television spot announcements and has sponsored the formation of a National Task Force on Equal Rights Amendment conformance and

conferences in various states throughout the nation, to the end of analyzing the legal and societal impact of the Equal Rights Amendment and implementing the ERA when it is ratified.

"8. Since at least August of 1974, the Commission has printed a newsletter, the purpose of which in part was to gain further public support and private donations to oppose rescission of the Equal Rights Amendment in California and promote its passage in other states; that the August 1974 newsletter stated that legal authorities agree that a state cannot rescind ratification, that said newsletter urged supporters of the ERA to contribute money to the National Organization of Women, Common Cause, the League of Women Voters and other organizations to help Equal Rights Amendment ratification and to contact friends in states facing ratification.

"9. The January 1975 newsletter urged contributions and letters to seven key swing states to effect ratification.

"10. The August 1975 newsletter urged the public to attend a rally at the State Capitol Building on August 26, followed by a visit to the legislators to ask for legislation conforming California laws to the Equal Rights Amendment and to oppose rescission of California's ratification.

"11. In 1976, the Commission published what it called 'the definitive work on the subject of the Equal Rights Amendment' entitled 'Impact ERA, Limitations and Possibilities;' that the book purports to show the ways in which the preent legal and social structure will be affected by ratification of the Equal Rights Amendment."

The Commission thus readily acknowledges that it is openly and

actively involved in the promotion nationally of ratifacation of the ERA (and opposition to its rescission in states which have previously ratified it) both at the legislative and the grass-roots levels. For example, it asserts in No. 8 that the Commission (not the Project) prints a newsletter, and in NO. 10, that the August 1975 newsletter urged the public to attend a rally at the State Capitol Building and to visit legislators "to ask for legislation . . . and to oppose rescission of the ERA." (Italics added.) Since the Commission is maintained at public expense, part at least of such activity necessarily is paid for by and with public funds.

In addition to the admissions from the Commission itself, in opposition to defendants' motion and in support of their own countermotion for summary judgment, plaintiffs submitted voluminous

records produced from the Commission's files on discovery which further documented the Commission's involvement in urging segments of the general public to contact their legislators in support of the ERA or conforming legislation. For example, attached as an exhibit to a declaration by plaintiffs' counsel, Thomas M. Burton, is the Commission's proposal to the Rockefeller Foundation seeking funding for the Project; under the heading "Involvement of Commission and/or Commissioners in ERA Ratification and Implementation," the Commission stated:

"For the past four years, adoption of an Equal Rights Amendment to the Federal Constitution has been first priority and has included the following specific efforts:

"Congressional Passage of the ERA.

". . . . . .

"Organization and implementation of direct contact with appropriate Congressmen and Senators by hundreds of California citizens to urge ERA adoption in Congress (letter writing, telegrams, phoning coordinated to action on passage of ERA in House and Senate).

"Ratification in California

"1. Formation of a statewide coalition for the ERA composed of 65 organizations (list attached) to coordinate efforts for ratification.

"2. Establishment of a committee in each California legislators' district to coordinate lobbying effort for ERA."

In Stanson v. Mott, the Director of the California Department of Parks and Recreation authorized the department to spend over $5,000 of public funds to promote voter approval of a $250 million park bond issue. Invalidating such action, the Supreme Court drew a

distinction between public agency "legislative lobbying," which is expressly authorized by Government Code sections 50023 and 53060.5,[2] and "election campaigning," which is not so authorized. (17 Cal.3d at p. 218.) After forcefully discussing the serious threat to First Amendment rights posed by governmental partiality in electoral matters, the court stated: "In the instant case, however, we need not resolve the serious constitutional question that would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning, because the legislative

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[2]These two sections apply to local governmental agencies and districts. The court pointed to no statute or decision authorizing lobbying by state agencies, but implied the existence of such authority. (See 17 Cal.3d at p. 218.) For purposes of this case we deem it to exist.

provisions relied upon by defendant Mott certainly do not authorize such expenditures in the 'clear and unmistakable language' required . . . ." (17 Cal.3d at pp. 219-220.)

Stanson poses two issues for resolution here. First, is the Commission's promotion of ERA ratification by the legislatures of other states properly "election campaigning," or is it more akin to "legislative lobbying?" Second,[3] if the former, is it authorized by the Legislature in "clear and unmistakable language?"

Both parties rely upon Hawke v. Smith (1920) 253 U.S. 221 [64 L.Ed. 871, 40 S.Ct. 495, 10 A.L.R. 1504], which held that proposed federal constitutional amendments may not be submitted to the

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[3]A third issue of course would be constitutionality. Since we find the action unauthorized, we do not reach it.

voters by referendum. The Commission asserts that this demonstrates that ratification is not an electoral process. Plaintiffs quote language from the opinion that ". . . ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." 253 U.S. at p. 229 [64 L.Ed at p. 876].) Plaintiffs also note that a state Legislature may not amend the proposed amendment, but must simply vote yes or no. Thus, say plaintiffs, ratification is not a legislative process and thus not a proper object for legislative lobbying.

(1) Such labeling is not very helpful to us. Rather, we conclude that the real issue under Stanson is not the objective of the promotional activity but the audience to which it is directed.

In enunciating the distinction between lobbying and electoral activities, the Stanson court reasoned as follows: "[W]hile public agency 'lobbying' efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies. Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute (see fn. 4, ante) in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election

campaign which attempts to influence the resolution of issues which our Constitution leave to the 'free election' of the people (see Cal. Const., art. II, § 2), does present a serious threat to the integrity of the electoral process." (Italics added.) (17 Cal.3d at p. 218.)

Footnote 4 to which the court refers sets out Government Code section 50023, which provides: "The legislative body of a local agency, directly or through a representative, may attend the Legislature and Congress, and any committees thereof, and present information to aid the passage of legislation which the legislative body deems beneficial to the local agency or to prevent the passage of legislation which the legislative body deems detrimental to the local agency. The cost and expense incident thereto are proper charges against the local agency."

This section limits lobbying activity to attending and presenting the public agency's viewpoint directly to the Legislature or Congress. (See 42 Ops.Cal.Atty.Gen. 25, 26 (1963), which concluded that the Tulare County Board of Supervisors was not authorized by section 50023 to spend county funds to mail information and recommendations on pending state welfare legislation to the registered voters of the county, because "[s]ection 50023 is restricted in scope to the presentation of information directly to the Legislature and Congress . . . ." (Italics in original.)) Nothing in section 50023 or similar section 53060.5 authorizes a public agency to direct its lobbying activities to the electorate itself. Thus we observe that the Stanson court's recognition and approval of public agency lobbying was limited to presentations

directed to the Legislature and Congress.

It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view. The latter "undermines or distorts the legislative process" just as clearly as "the use of the public treasury to mount an election campaign . . . [distorts] the integrity of the electoral process." (Stanson, supra, 17 Cal.3d at p. 218.) (Italics added.)

This distinction as to the audience to which the material is directed is further apparent in the Stanson court's discussion of the necessary information-disseminating function fulfilled by public agencies. Quoting from Citizens to Protect Pub. Funds v. Board of Education (1953) 13 N.J. 172,

180 [98 A.2d 673, 677], Stanson made it clear that although a public agency may not use public funds to advocate one side of an issue, it does not need specific legislative authorization to provide voters with "'relevant facts to aid them in reaching an informed judgment when voting upon the proposal.'" (Stanson, 17 Cal.3d at p. 220.) Thus the court indicated that agency communications with the public must "provide the public with a 'fair representation' of relevant information . . . ."[4] (17 Cal. 3d at p. 221.)

One of the cases cited with approval in Stanson, Stern v. Kramarsky

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[4]The Factual disputes before the court on the summary judgment motion are more that adequate to present triable issues of fact as to whether the information supplied by the commission to the public regarding the ERA and its effect is always accurate, impartial or fair.

(1975) 84 Misc.2d 447 [375 N.Y.S.2d 235], concerned the identical issue here. That case sustained a taxpayer attack against the campaign of New York's Division of Human Rights for an Equal Rights Amendment to the New York Constitution:

"The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well-motivated, can only demean the democratic process. As a State Agency supported by public funds they cannot advocate their favored position on any issue or any candidates, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality.

"It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to

disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America. This is true even if the position advocated is believed to be in the best interests of our country.

"To educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be." (375 N.Y.S.2d at p. 239.)

Federal courts and congressional committees have interpreted federal law in a similar fashion. 18 United States Code section 1913 prohibits the expenditure of governmental agency funds

to influence Congress, with a proviso that ". . . this shall not prevent officers or employees of the United States . . . from communicating . . . to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business." In Am. Public Gas Ass'n v. Fed. Energy Administration (D.D.C. 1976) 408 F.Supp. 640, 642, the court held that the prohibition on using appropriated funds was directed at activity "likely to induce persons to contact their congressman," and thus was not applicable to a pamphlet published by a federal agency which, although admittedly biased, only presented certain facts and arguments and did not mention any specific legislation nor urge or request readers to communicate with members of Congress.

Recent congressional hearings on the use of Commerce Department Maritime Administration funds and personnel to support a private lobbying organization, the National Maritime Council, provide excellent background material on the difficult problem of delineating proper from improper agency lobbying. The following statements from the material are appropos to the present case: ". . . section 1913 was generally intended to prohibit the use of Government funds for public relations campaigns or other such activities which are intended to result in communications to Members of Congress and to influence them concerning specific legislation either directly, indirectly through artificially stimilated letter compaigns, or through governmental support of organizations which 'lobby' the Congress. Promotional campaigns aided or assisted by Federal funds

which are directed towards economic goals or general public benefits, such as advertisements or publications designed to increase the utilization of goods or services of a particular industry or technology, or to conserve certain resources, might not come within the prohibition, then, when not directed at or concerned with particular Federal legislation or otherwise intended to influence a Member of Congress in the passage or defeat of Federal legislation.

". . . . . .

"The particular nature and content of a federally financed publication, advertisement, or other promotional campaign device would thus apparently be the determining factor as to a violation of the statute on a case-by-case basis. Members of the Administration or other Federal officers or employees may apparently express their views

publicly on the need for certain legislation and programs. However, it appears that federally financing or aiding pulications or advertisements or the like which are part of a publicity campaign advocating the passage or defeat of Federal legislation with the intention or likelihood of garnering public support to influence Members of Congress on a specific issue or piece of legislation, would be that type of prohibited activity contemplated by the statutory provision." (Hearings on Subcom. of the House Com. on Government Operations, pt. 2, on Problems in the Relationship Between the Commerce Department's Maritime Administration and the National Maritime Council, a Private Trade Organization: etc. (July 20 and 21, 1978), pp. 340-341. See also Rep. by the Com. on Government Operations (32d Rep.) on Problems in the Relationship, etc. Union Calendar No.

908. House Rep. No. 95-1680 (Oct. 2, 1978).)

The Supreme Court of Massachusetts aptly summarized the principle. "The Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree." (Anderson v. City of Boston (1978) - Mass. - [380 N.E.2d 628, 639].) The court footnoted its approval of an incisive passage from an advocate's brief to the effect that "'the danger that public debate will be overwhelmed by the speech of public entities may well warrant a prophylactic rule restricting speech by government bodies to matters closely related to their official responsibilities.'" (Id., fn. 18.)

The plaintiffs made an adequate showing on the summary judgment motion

that the Commission's activities involve election campaigning and not merely legislative lobbying. Accordingly "clear and explicit" legislative authorization for its advocatory or promotional position of ERA is needed. We do not find it. Although the Commission is given broad powers to do anything "which may be necessary, desirable, or proper to carry out the purposes of this chapter" (Gov. Code, § 8224, subd. (b)), such broad statements were held in Stanson to be insufficiently "' clear and unmistakable' . . . . " (17 Cal.3d at pp. 219-220.) Nothing else in the statutes clearly and explicitly authorizes the Commission to urge the public to support the passage of legislative or constitutional measures. Therefore, any expenditures of public funds to marshal public suport for the ERA were unauthorized, and the trial court

erred in granting summary judgment.

II

The judgment must be reversed. Apparently some of the financial support for the Commission's advocacy of the ERA to the general public came from a Rockefeller Foundation grant (see fn. 1, ante, p. 764). But the complaint alleges that the Commission has ". . . expended public funds of the State of California in order to promote and gain widespread public suport for the controversial political views and feminist goals of the COMMISSION and its members, and to obtain ratification of the Equal Rights Amendment by California and by other states . . . ." This was not negated by defendants in the summary judgment motion; indeed it was impliedly admitted by them. (See ante, pp. 764-765.) There exists a factual issue as to the source of funding for particular communications,

which cannot be resolved by summary judgment. Moreover, as above noted, the question of whether a given public communication is "informational" or "promotional" is also a factual issue for which summary judgment is inappropriate. (See Stanson, 17 Cal.2d at pp. 222-223.)

III

Our conclusion makes it unnecessary to discuss other contentions of plaintiffs.

We cannot however ignore our separately concurring brother, whose polemics in support of the Commission, like those of the trial judge (whom he extensively quotes), are wholly foreign to the issue before us. Though highly esoteric and complex in its solution, the issue itself is straightforward and simple. Did the trial court overlook one or more triable issues of fact, thus falling into error? Having determined

that it did, with which conclusion our brother seems to agree, we should go no further, leaving unventilated other potential issues not presented to us for decision, and our personal views. Accordingly we disavow substantially all the concurring comments embracing only that small segment which directly relates to our topic.

Lest this adherence to judicial tradition eschewing the discussion of subject matter not before us for adjudication be now construed by some as male chauvinism, we hereby declare that like all fair-minded persons we avidly espouse the concept of equality, including equality of women to men, as embodied in the Civil Rights Act of 1964 (42 U.S.C. § 200e-2), the United States Constitution (14th Amend.), and the California Constitution (art. I,§ 8). Nothing more need be said.

The judgment is reversed.

Puglia, P. J., concurred.

REYNOSO, J.- I concur. The concurrence, as I explain below, is a limited one.

The trial court dealt with a constitutional and statutory broadside attack on the existence and effort of the California Commission on the Status of Women. The Complaint prayed, in part, "That the Court declare the Commission dissolved, its acts . . . and the law establishing it null and void." None of the theories advanced by plaintiffs, with the exception I discuss below, merit more that a polite nod.[1]

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[1]I regret the majority's failure to dispose of the other issues on appeal: (1) Does the establishment of the Commission (a) violate the separation of powers doctrine, or (b) deprive appellants of equal protection of the law, and their First Amendment rights; (2) Is the Commission's promotion of the Equal Rights Amendment authorized by Government Code section 8220 et seq.? (3) If authorized are those sections

The legislative purpose of the Commission was articulated by the trial court with a sensitivity toward history:

"Study, research, the gathering and dissemination of relevant information was determined to be the best initial approach. These functions have been and are being served by the Commission herein. Anyone who cannot comprehend the compelling interest involved herein is either unaware of, oblivious to or totally insensitive to the history of the treatment of women. The Legislative purpose of the statutes creating the Commission was to study and provide information on what further could be done by the Legislature to bring women to

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void for vagueness? In my view, these contentions have no merit and would properly be the subject of a partial summary judgment. Judicial economy requires that we dispose of those issues or give guidance to the trial court.

the level of enjoying equal protection under our laws. (In 1837 the desire of women for equal protection under the law was succinctly stated by an early American feminist, Sarah Grimke who said: 'I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.')

"At the Women's Rights Convention at Seneca Falls, New York in 1848, a Declaration of Principles was adopted paraphrasing the Declaration of Independence, it held 'these truths to be self-evident; that all men and women are created equal.'

"The Fifteenth Amendment to the U.S. Constitution, enacted in 1869, guaranteed universal suffrage for men. If was not until 1920 that women gained the right to vote by the enactment of the Nineteenth Amendment. While this was a giant step forward, compared to the

status of women under the Code of Hammurabi, wherein women were legally chattels of men, it did not abate any of the discrimination practiced against women in employment, pay, jury service, right to a separate domicile, capacity to enter into binding agreements, capacity to sue and be sued, change in citizenship upon marriage to an alien, change of name upon marriage and many other areas wherein a person's sex made the sole difference in the treatment he or she would receive under the law of the United States and of California. Legislatively and judicially many of these discriminations have been and are being abolished." Under the California Constitution, a legislative classification based on sex is suspect. (Sail'er Inn, Inc. v. Kirby (1971) 5 Dal.3d 1, 20 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].) The creation

of the Commission on the Status of Women was a legislative recognition that a compelling interest existed in improving the legal, social, political and economic status of women.

There is only one issue which, in my view, presents a triable issue of fact on the present state of the record. That issue is whether the Commission has been involved in (1) lobbying (which is permitted), (2) "promotion" in a political campaign absent express legislative authorization (which is proscribed under Stanson), or (3) activity which may be described as somewhere between lobbying and direct political activity during a campaign. The stipulation of facts entered into by the parties is vague regarding the issue we consider. Accordingly, as is explained below, the moving party, defendant Commission, has failed to

make the type of showing required. (4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 181, p. 2833.) The stipulation inferentially raises an issue of fact as to the precise nature of the activity conducted by the Commission and whether that activity is proper or proscribed. It may be that when all the facts and evidence are before the trial court, the facts will fit neatly within that activity which is not prohibited or that which is.

I do not share my brethrens' apparent suggestion that conducting grass roots lobbying campaigns in support of Equal Rights Amendment is per se proscribed. Lobbying activity invariably means that the lobbyist (here the Commission) will be in contact with constituents to know their views as well with legislators. One of the legislative purposes of the Commission is to

"encourage women's organizations . . . to institute local self-help activities designed to meet women's educational, employment, and related needs . . ." (Gov. Code, § 8225, subd. (d).) Thus, the Commission is mandated to be in helpful communication with the grass roots organizations. If, however, the facts as they are developed in the trial show that the Commission was involved in "election campaigning" with respect to candidates which support Equal Rights Amendment, or otherwise directly involved in such campaigns, then we do have activity which is proscribed by Stanson v. Mott. It must be apparent that I take strong exception to my colleagues' apparent conclusion that plaintiffs have already made an adequate showing on a summary judgment that the Commission's activities involve election campaigning.

With respect to promotional

activity, I agree that the real issue is not the objective but the audience to which it is directed. At times, however, the distinction may be more apparent than real. Thus, for example, the Commission is certainly authorized to take a stand in favor of Equal Rights Amendment and to issue a press release to that effect. The principal audience presumably is the legislators; surely a secondary audience must be the media and through the media the electorate. I cite this example as one which in my view is not proscribed. Further, whether the activity is "promotional" in an electioneering sense or promotional in terms of fulfilling a legislative mandate is not self-evident. Each challenged activity must be scrutinized.

On the one hand, the law seeks to protect the public from a "big brother" approach by government which seeks to

propagandize on public issues. On the other hand, we must provide the governmental entities the freedoms to carry out their legislative missions. In the case of the Commission of the Status of Women the mission may be controversial and not pleasing to the plaintiffs. We, as a court, must nonetheless not interfere with that legislative mandate.

Because of the drastic nature of a summary judgment and the importance of safeguarding the adverse party's right to a trial, the moving party must make a strong showing. The courts wil construe the moving party's affidavits strictly and the counteraffidavits liberally. (See 4 Witkin, Cal. Procedure, supra, § 181, p. 2833.) Conflict of facts (and presumably factual inferences to be drawn from a stipulation) must be resolved in favor of the nonmoving party. (See Chesney v. Gresham (1976) 64 Cal.App.3d

120, 125 [134 Cal.Rptr. 238].) Since all inferences are against the moving party, I conclude that the stipulation does raise a sufficient factual issue to go to trial only on this narrow issue: Is any of the Commission activity proscribed as being improper electioneering? The remedy, of course, may be no more than a declaratory judgment.

A petition for a rehearing was denied January 18, 1979. Reynoso, J., was of the opinion that the petition should be granted. Respondents' petition for a hearing by the Supreme Court was denied March 22, 1979. Bird, C.J., Tobriner, J., and Newman, J., were of the opinion that the petition should be granted.